IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT L. AYERS, JR., :

ACTING WARDEN, :

Petitioner :

v. : No. 05-493

FERNANDO BELMONTES. :

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Washington, D.C.

Tuesday, October 3, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

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ERIC S. MULTHAUP, ESQ., Mill Valley, California; on behalf of the Respondent.

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P R O C E E D I N G S

[11:05 a.m.]

CHIEF JUSTICE ROBERTS: We'll argue next in Ayers vs. Belmontes. Mr. Johnsson.

ORAL ARGUMENT OF MARK A. JOHNSON

ON BEHALF OF PETITIONER

MR. JOHNSON: Mr. Chief Justice and may it please the court.

This case concerns the constitutional sufficiency of California's catch-all Factor (k) instruction which was given in the penalty phase portion of California capital cases and which directed the jurors to consider any other circumstance that extenuates the gravity of the crime even though it is not a legal excuse for the crime. In this case the Ninth Circuit Court of Appeals held that this instruction violates the Eighth Amendment because it allegedly misled jurors to believe they could not consider so-called forward-looking evidence that did not relate directly to the defendant's actual culpability for the crime itself.

In the state's view the Ninth Circuit's conclusion is fundamentally flawed because it rests on an illusory distinction between different forms of character evidence in a way that is inconsistent with this Court's prior decisions in Boyde vs. California and Brown vs. Payton. In Boyde this Court addressed and rejected a virtually identical challenge to the Factor (k)

and concluded that its instructions did allow jurors to consider non crime related evidence; specifically it allowed the jurors to consider evidence of the defendant's background and character. There was nothing more in the Boyde decision to support the Ninth Circuit's distinction between different forms of character evidence. In fact, our board implicitly acknowledged that the Factor (k) would in fact be understood to encompass Belmontes' good character evidence in this case because for all practical purposes there is no meaningful distinction between the nature of the background and character offered in Boyde and the nature -

JUSTICE STEVENS: Mr. Johnson, would you comment on the footnote on the, drawing the distinction with regard to the dance found that the defendant won in that case, between - it's over here. I'm asking the question. Between the facts that occurred before the crime and facts that might have occurred after.

MR. JOHNSON: Yes Your Honor. In footnote 5 this Court addressed a contention that was for the first time in an argument that Boyde's evidence might be admissible under Skipper vs. South Carolina and this Court distinguished Boyde from Skipper for a couple of reasons. First, as Your Honor pointed out, the evidence in this case related to good character evidence, events that occurred before the crime itself, unlike in Skipper which dealt with post crime events. The Court also

pointed out that the evidence in Boyde his dancing achievements and his good character evidence in that case was not offered for the specific inference that the evidence in Skipper was offered. The Court in footnote 5 and in the opinion in general in Boyde nonetheless found that this evidence did in fact constitute good character evidence of the, of the defendant's present good character because it showed that his crime was an abberation from otherwise good character. As Justice Marshall put it in his dissenting opinion that Boyde had redeeming qualities which was a decidedly forward looking consideration. And as I was saying, the evidence in this case --

JUSTICE SCALIA: It doesn't have to be forward looking, does it? I mean, I thought we've said so long as it can be taken into account in any manner, whether backward looking or forward looking. Haven't we said that explicitly?

MR. JOHNSON: Yes Your Honor. In fact the court has in Franklin vs. Linite said that they've not distinguished between different forms of character evidence. And I understand that in the past we have always discussed background and character evidence as sort of the same thing. In this case, however, the Ninth Circuit's conclusion does in fact rest on a distinction between different forms of backward looking and forward looking character evidence.

JUSTICE KENNEDY: Well it was, addressed themselves to the factor, to words of the Factor (k) instruction. How does post

crime prison conduct reduce the seriousness of a previous crime?

MR. JOHNSON: It does not, it does not relate to the seriousness of the crime at all. But Boyde's --

JUSTICE KENNEDY: Well, I mean it has to relate to the gravity of the crime under the words of Factor K, doesn't it?

MR. JOHNSON: It would relate to the gravity, the circumstances that extenuate the gravity of the crime for purposes of a jury's sentencing determinations. And the point I'd like to make on that point is this, Your Honor. In California jurors are well aware what their task is at a sentencing determination. In California, the guilt and the death eligibility determinations are made during the guilt phase trial and the jurors are expressly told during the penalty phase trial that their lone determination, their one concern is to decide between a sentence of death or a sentence of life without the possibility of parole. And that way the jurors are very well aware that the only determination in a California case is to make a moral, normative determination, a single moral determination as to whether this man, this defendant standing before them in this court today deserves death or life without possible of parole.

JUSTICE KENNEDY: Do you have an instruction that supports what you've just told us that the jurors have to make a single moral determination? Is that what the court instructed them to do? The court instructed in items of Factor (k), and I think

you have to rest on your argument that what we are talking about is the gravity of his crime for purposes of sentencing. I understand that argument. But then when you go on to make the argument that you just made, the jury understands it's a single moral judgment, is there some specific instruction you can point to other than the Factor (k) instruction itself?

MR. JOHNSON: There are, and I may have been misleading. The jurors are expressly instructed that is that it is their duty to determine, and their only duty to determine whether the defendant should receive life or death in parole, or life without the possibility of parole. And in light of that determination, jurors naturally would understand that they could take into account anything that extenuated the gravity of the crime.

CHIEF JUSTICE ROBERTS: Well, that's what they were told, right? They were instructed that the mitigating circumstances including Factor (k) are merely examples, right?

MR. JOHNSON: Yes. In this case -- yes. In this --

JUSTICE STEVENS: May I ask you about that? This case is unusual because it has that separate instruction that the mitigating circumstances are merely examples and you should pay careful attention to those which are made, which are made to rely on other mitigating circumstances.

May I ask you, would it have been constitutional if the judge had added a sentence at the end of that instruction which

said however, you may not consider anything mitigating unless it extenuates the gravity of the crime?

MR. JOHNSON: It would have been constitutional to the extent that it would have allowed the jurors to give some use whatsoever to Belmontes' proffered evidence in mitigation, and that's what this Court's prior case is -- particularly, the various Texas cases have said that jurors must be given an avenue to make use of the evidence. In California --

JUSTICE STEVENS: I'm not sure you've answered my question. Would it have been a constitutional addition to that instruction to say that I want you to clearly understand that is not to be considered mitigating unless it extenuates the gravity of the crime? Would that have been permissible?

MR. JOHNSON: It would appear to -- no. It would appear not to be.

JUSTICE STEVENS: Because that would have foreclosed consideration of the Skipper type evidence.

MR. JOHNSON: Well, it would foreclose consideration of all character evidence, I believe. It would foreclose the consideration of Boyde's evidence, of Payton's evidence.

JUSTICE STEVENS: So then the question in this case is whether the jury might have understood Factor (k) to limit them to the consideration of factors that extenuate the gravity of the crime?

MR. JOHNSON: Yes. The question is whether the jurors

would reasonably understand the instruction to preclude the consideration of constitutional --

CHIEF JUSTICE ROBERTS: This Court in Payton said that it was not unreasonable to conclude that evidence of remorse extenuated the gravity of the crime. So why wouldn't an instruction to the jury along the lines of Justice Stevens' hypothetical have been perfectly constitutional as extenuates the gravity of the crime that's interpreted in Brown vs. Payton?

MR. JOHNSON: Well, to the extent the jurors would have likely understood that, that instruction in Belmontes and in Payton to extenuate the gravity of the crime for purposes of their sentencing determination.

JUSTICE SCALIA: Well, that's what I thought your position was. And then you back off of it, and you say extenuate the gravity of the crime doesn't relate to anything that comes after the crime. I would have interpreted the phrase to mean anything that justifies you in giving a lesser punishment for the crime.

MR. JOHNSON: That's precisely my argument.

JUSTICE SCALIA: Well, then your answer to Justice Stevens should have been different.

MR. LONG: Well, and I apologize if I misunderstood my question --

JUSTICE GINSBURG: Do you think that the jury in this very case understood that, given the questions that were asked.

MR. JOHNSON: Oh, yes, Your Honor. In this case, there is

certainly no reasonable likelihood that the jurors felt precluded, because as was previously discussed, first there was this additional instruction that supplemented the other instructions in this case that made it very clear that the aggravating factors, the various factors listed in the standard instruction A through G, that those -- they could only rely on those two for aggravating factors, but their understanding of mitigating factors was not limited. In fact, they are expressly toward that that the previous doctors were merely examiners.

JUSTICE GINSBURG: What actually went on, the jury first came in, and said, what if we can't decide, can we decide by majority. And then the question was asked that seemed to indicate the jurors' understanding that we take all those factors that you told us about, and we just take those factors into account. And there were clarifying instructions as by the defense that were not given.

MR. JOHNSON: Well, to answer your questions, Your Honor, first, there was no indication at this conference that the jurors were, in fact, confused about whether they could consider any particular evidence as being mitigating. The conference itself was called to address, as you mentioned, the jurors' concern -- or the jurors' inquiry about the result -- what would happen if they couldn't reach a unanimous verdict in this case.

JUSTICE SOUTER: Well, that may be why they got into -- they got into the colloquy because, as Justice Ginsburg

described, and as I recall, the last referenced two factors, whether aggravating or mitigating, was simply in terms of the list or the listing, I guess the term was.

So that it seems to me at least that the clear argument on the other side of this case, that the last reference that the, that the judge made to the jurors with respect to aggravation on mitigation was to refer to a listing.

The listing itself didn't have anything to do, as I understand it, with the instruction that you are not limited to the listed mitigating factors. So the concern is that because the last reference was to the list, that the list included Factor (k) without embellishment, and that jurors tend to give -- we have held that the jurors tend to give the greatest emphasis to clarifying instructions or later instructions in response to questions. Isn't it a pretty good argument that in this case, there is a reasonable likelihood that the jurors went back to their task thinking that they were limited to the list?

MR. JOHNSON: Respectfully, no, Your Honor. And the reason why is that --

JUSTICE SOUTER: I'm not necessarily saying that's my position, so you don't have to be respectful to me about it.

MR. JOHNSON: I'll be respectful.

JUSTICE SOUTER: If you can.

JUSTICE GINSBURG: Be respectful anyway.

MR. JOHNSON: The point is with this instruction

conference, an argument that -- that this reference to the listing reflected some unconstitutional -- or constitutionally restrictive view presupposes that the jurors reasonably would have misinterpreted the meaning of the Factor (k), and there is nothing in there, in any of these questions to put anybody on notice that they had any such concerns.

JUSTICE SOUTER: Well, first, with the language in Factor (k) itself, and without some embellishment, isn't it a bit of a stretch to think that Factor (k) goes as far as Skipper evidence?

MR. JOHNSON: No, Your Honor, it's not a stretch at all, because any evidence relating to the defendant's background and character, present character in court, could be seen as extenuating the gravity of the crime for sentencing purposes.

JUSTICE GINSBURG: Well, California itself recognized that there was a problem here of jury confusion. And now they have amended the provisions, so that it would be clear to any juror.

MR. JOHNSON: That's correct, Your Honor, in People vs. Easley --

JUSTICE SCALIA: Well, maybe they thought that was a problem of Ninth Circuit confusion rather than jury confusion. I mean, having that opinion in front of them, you would think they would amend it, of course, to prevent that kind of decision again.

MR. JOHNSON: Well, what they were doing was certainly a

prophylactic measure here, to -- they recognized that perhaps there might be some concern of confusion, and so they wanted to forestall any chance of that happening. But notably, this case and -- this case and the other California Supreme Court cases found that the Factor (k) instruction, the pre-Easley version of it, by itself, did mislead the jurors. In fact, the supreme court in this case came down 7-0 in support of a conclusion that the jurors were properly told about the --

JUSTICE GINSBURG: Where does this Factor (k) come from? What was the source of it?

MR. JOHNSON: The Factor (k), it has the entire standard instruction given these cases recites verbatim the language of the California statute which was California penal code Section 190.3 and interestingly enough not only the California Supreme Court but this court implicitly they said that not only the California statute but the instruction, this standard instruction upon which is based on the statute do allow consideration of all relevant mitigating factors in fact as far back as 1983 in this court's California V. Ramos decision this court stated that the Factor (k), that the standard instruction would allow consideration of background and character evidence and in fact the court stated in footnote 20 --

JUSTICE GINSBURG: Mr. Johnson, I don't want to interrupt you but I want to make sure you stick to your answer to my question earlier bus I think you /KHAEPBSed your answer after

the Chief Justice and Justice Scalia might have said it was a mistake. Is it your opinion to instruct the jury that you may not consider any evidence mitigating unless it ex-ten waits the gravity of the crime?

MR. JOHNSON: Yes Your Honor because the jurors even if that instruction were given the jurors would understand that an instruction that ex-taken waits the gravity of the crime would encompass irrelevant character evidence and this court has made determinations all the time.

JUSTICE GINSBURG: Is that answer consistent with the position of defense counsel who said he would not insult the intelligence of the jury by suggesting to them that the religious conversion of the Defendant did not ex-ten wait the gravity of the crime?

MR. JOHNSON: No, Your Honor. What the counsel actually said was defendant's religious conversion did not provide an excuse for the crime itself and in fact, that argument was itself echoing the language of the Factor (k) instruction which of course -- that's right.

MR. JOHNSON: Which instructs the jurors to consider any that ex-ten waits the gravity of the crime, even though it's not a legal excuse for the crime. And so counsel was dovetailing his very effective argument with the instruction itself. And what's significant here is that like in Payton, like in Boyde, this case involved virtually all of Belmontes' penalty phase

evidence. And the entire main thrust of his argument to the jury was that he could not make it on the outside but he could fit in the system and contribute to society in the future if given a chance on the inside. And again as was true in Boyde and Payton --

JUSTICE STEVENS: If were true would that have extenuated the gravity of the crime, if he could get along in prison.

MR. JOHNSON: Yes, for purposes of jury sentencing determination. Absolutely. Because it would be viewed as good character evidence.

JUSTICE STEVENS: And you think jurors would clearly understand that what he did in the future in prison would extenuate the gravity of the crime?

MR. JOHNSON: Yes Your Honor. Because in light of everything that's been said and done in this trial, as the Boyde court noted jurors do not parse instructions for subtle shades of meaning. They understand instructions in a commonsense manner and --

CHIEF JUSTICE ROBERTS: The prosecutor didn't object to any of this mitigating, mitigation evidence that was submitted by the defendant, did he?

MR. JOHNSON: The prosecutor objected to none of this evidence and in fact the prosecutor in closing statement argued that not only could the jurors consider Belmontes' forward-looking prospects but the jurors should consider those

prospects. So in this case what we have --

JUSTICE GINSBURG: Well, the prosecutor's closing was schizophrenic because he said, but really it didn't matter.

MR. JOHNSON: He acknowledged it was something that, this argument was something that was proper for consideration, but however he argued that the evidence of Belmontes' religious conversion which happens, you know, and then elapsed immediately before he committed the murder of this case, was very weak evidence. But he did nonetheless tell the jurors that they could consider Belmontes's prior character as bearing on his present character now.

JUSTICE SOUTER: But didn't he go beyond saying it was weak? He did say that. But didn't he say he doubted that it fit within K?

JUSTICE GINSBURG: Yes.

MR. JOHNSON: Yes. The prosecutor first stated that the Factor (k) was a catch all, a true catch all.

JUSTICE SOUTER: So the prosecutor I take it would have answered Justice Stevens' question the other way. The prosecutor would have said well this probably would not be understood by the jurors to refer to the gravity of the offense.

MR. JOHNSON: No, Your Honor. Because in the previous page the prosecutor did state that it was a catch all, you know, which by implication incorporates everything. And the prosecutor's argument that I'm not sure if it fits in there,

signifies that, not that the evidence, that such evidence could not be considered as mitigating in a general manner, but that just as the religious evidence in this case was externally weak to the point of having as a practical purpose no mitigating value, the prosecutor followed that comment, I'm not sure if it fits in the there, in next breath with, respecting the fact that it's no secret that Belmontes's religious evidence is pretty shaky here. And went on to conclude that. But then in the next breath he said that nonetheless this is something that's proper for to you consider.

And again reasonable jurors hearing this, having been given the instruction here would reasonably interpret this, all of this evidence as something they could use to extenuate the gravity of the crime. And particularly in this context because like in Boyde, in addition to this Factor (k), the standard instruction directed the jurors to consider all the evidence. The first factor of the enumerated factors A through G in this case told the jurors that they should, that they should focus on, that the first thing to consider was the, or the circumstances of the crime itself.

The final factor therefore that any other circumstance that extenuates the gravity of the crime would clearly be understood to relate to matters outside of the crime itself. And to the extent that there was any ambiguity about the meaning of that in this particular case, the argument by counsel, the additional

instruction here, clarified that to the point that there is certainly no reasonable likelihood that the jurors felt that they were constrained in considering any mitigating evidence in any way they thought fit.

JUSTICE GINSBURG: Mr. Johnson when I asked you about the derivation of Factor (k) you gave me a California statutory cite but does it come from any model code? Does any other state have such a provision? How widespread is it?

MR. JOHNSON: The actual wording of this instruction?

JUSTICE GINSBURG: How many states have an instruction that talks about extenuating the circumstances of the crime?

MR. JOHNSON: I'm not sure, Your Honor. I'm not sure. I know that this instruction itself came from a statute which in turn was, was adopted from the California Briggs initiative in the 1978 statute. I'm not aware of any, of any other states, there may or may not be, who have adopted the same statutory model that California has.

JUSTICE GINSBURG: Which, California hasn't had it since 1983, right?

MR. JOHNSON: Pardon me, Your Honor?

JUSTICE GINSBURG: California hasn't used this instruction since 1983?

MR. JOHNSON: That's correct, Your Honor. After People V. Easely, the California Supreme Court augmented the instruction.

JUSTICE GINSBURG: So is this a one of a kind case? And

you said in your brief that the Ninth Circuit decision threatens many other valid California death judgments. But these would all have to be rather ancient cases?

MR. JOHNSON: Yes. And unfortunately, there's several of them that are still being litigated. I have done research on this issue and as of this date, I can't give you an actual, an absolute number but I believe there is approximately 15 cases pending like this one that involve the Factor (k) instructions, this Factor (k) instruction, that involve evidence of somehow future looking evidence, which all character evidence frankly is future looking --

JUSTICE GINSBURG: And that wouldn't wash out on the other grounds?

MR. JOHNSON: Right. That are, that are still pending and that are unlike Payton, are now governed by the ADPA.

JUSTICE SCALIA: You're saying those convictions are more than 23 years old.

MR. JOHNSON: Yes, Your Honor. Unfortunately, there is, there, I believe all of them are being litigated now in the federal court system in California. If you have no further questions, I guess I'll reserve rest of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. Mr. Multhaup.

ORAL ARGUMENT OF ERIC S. MULTHAUP

ON BEHALF OF RESPONDENT

MR. MULTHAUP: Mr. Chief Justice and may it please the

court.

Here is Respondent's 60 second nutshell summary of our core position. This case does not turn on the constitutional factor (k) standing alone. Rather it terms on a straightforward application of the Boyde test, due to the unusual, unique circumstances that occurred during the argument, instructions to deliberations at the penalty trial of this case.

Here are the two key components of our claim. During arguments to the jury both counsel conveyed to the jury that Belmontes' evidence of Youth Authority religious experience was not covered by Factor (k). However, both counsel suggested to the jury that it should be considered anyway. Now this is unusual because of all things that the district attorney and defense counsel disagreed on, this is one that they did agree on and it's likely the jury might have taken note of that.

The case then proceeded to instructions and deliberations. The jury came back to court, announced that they were deeply divided, perhaps with the majority favoring life. The turning point occurred when one juror, Juror Hearn, requested judicial confirmation that the specific list of factors previously given was the only basis, was the only framework in which the penalty decision could be made. At that point, the trial court had a constitutional obligation to disabuse Juror Hearn and the rest of the assembled jurors of that misapprehension and at the very least to reinstruct the jurors that the enumerated factors were

merely illustrative and not exhaustive, and instruct the jurors that the jury had to consider all of the mitigating evidence.

The trial court did neither, with the result that the jury all too likely would turn to its deliberations with the belief that the only factors, the only matters they considered, could consider were those encompassed within the enumerated factors and believing based on counsel's prior arguments that Factor (k) did not include the Youth Authority religious experience evidence.

JUSTICE ALITO: When did the defense counsel say this this evidence did not fit within Factor (k)?

MR. MULTHAUP: Your Honor, it occurred in argument -- and my counsel -- esteemed co-counsel will give me the exact page -- but it occurred in the context. The context, during the prosecutor's argument, the prosecutor said to the jury that, "I suspect, in any -- for emphasis, that I can't imagine that you won't be told that the religious-conversion evidence doesn't fit within Factor (k)." And, at that point, he expressed reservations, doubts, as to whether it did fit in Factor (k) or --

CHIEF JUSTICE ROBERTS: Why does that --

MR. MULTHAUP: -- any other factor.

CHIEF JUSTICE ROBERTS: Why does that matter? Because the jury was told that the factors were merely

examples of the mitigating evidence they could consider.

MR. MULTHAUP: I'm --

CHIEF JUSTICE ROBERTS: It probably didn't fit into Factor (h), either, but it doesn't matter.

MR. MULTHAUP: Well, it has -- if it -- oh, Your Honor, the -- calling your -- or you called my attention to the instruction that said that the -- that, in the prior set of -- or in the general set of instructions, that the enumerated factors were merely illustrative. Now, that instruction had a cloud of confusion surrounding it, because the way it was phrased was that the Court said, "The mitigating factors that I have expressed to you are illustrative." There was no list of mitigating factors. There was only a single list, unitary list, of factors that could be either aggravating or mitigating, depending on a jury's decision.

The instruction that you're referring to, Your Honor, was a -- the -- was the result of the trial court denying some, and granting some, parts of the special instructions requested by the defense. And so, when the trial court said to the jury, "The list of mitigating factors is illustrative only," I -- we, who know the background of this, understand what -- the point he was trying to make, but the jury hearing it, they would think, very reasonably, "There's no list of mitigating factors."

JUSTICE ALITO: Well, you said this case is different, because both counsel told the jury that the evidence that you're relying on did not fit within factor (k). And I'm not sure what you're referring to.

MR. MULTHAUP: Okay.

JUSTICE ALITO: Now, as the defense counsel, are you referring to what you quoted on page 9 of your brief, where he says, "I'm not going to insult you" -- what you highlighted on page 9 -- "I'm not going to insult you by telling you I think it excuses, in any way, what happens here"? That's what you're -- is that what you're referring to?

MR. MULTHAUP: That's one of the passages that I'm referring to, and it came as a direct response to the District Attorney, in effect, calling out the defense attorney, "I can't imagine that you won't be told that this is, in fact, your case." So, at that point, the defense counsel had to make a decision, "Okay, either I have to argue that my Skipper evidence is -- my square peg of Skipper evidence has to fit in the round hole of" --

JUSTICE ALITO: Isn't he --

MR. MULTHAUP: -- "Factor (k)" --

JUSTICE ALITO: -- saying something very different there? He isn't -- he is not saying, "This doesn't fit within Factor (k)." And he makes no reference

to Factor (k). He says nothing about "extenuating." He says "excuses." Isn't that something very different, "excusing" the crime?

MR. MULTHAUP: Your Honor, this Court has used the terms "extenuate" and "excuse" as synonyms in Boyde and --

JUSTICE ALITO: If you had

MR. MULTHAUP: -- in Payton --

JUSTICE ALITO: If you were arguing this to the jury, would you have said, "You know, my client earned a position of responsibility on the fire crew that patrolled the Sierra Foothills, and, therefore, that excuses the crime that you've found that he committed here"?

MR. MULTHAUP: No. No.

JUSTICE BREYER: I don't see anywhere in Schick's statement -- I mean, from 155 to 170, where he says what you said he said. I mean, now, maybe he says it some other place, but I'd like a reference to it. But I -- what I have him as saying is that -- he says, for example, several times, "The presence -- I don't suggest that the -- that the presence of religion, in itself, is totally mitigating." Well, it certainly wasn't, in this instance. I gather I'm right. Am I right in thinking that all this religious conversion took place before he murdered the girl? So, this is not a case of your trying

to get some evidence that took place after the crime.

MR. MULTHAUP: That's right. And --

JUSTICE BREYER: All right. If that's right, then maybe it does more easily fit within Factor (k). The prosecutor told the jury they should consider it, or they could. The judge told the jury they could consider it -- says you take it -- this is an example -- he says, "It's an example in Factor (k)." Maybe he's wrong, but they certainly likely think they can consider it. And Mr. Schick doesn't say it's not in Factor (k). At least, I don't see it. That's why I'm asking.

MR. MULTHAUP: Your Honor, the whole point of Factor (k) is that -- evidence that's an excuse for the crime. And if we're --

JUSTICE BREYER: No, no, I know the point of Factor (k). I'm trying to be absolutely certain, before thinking --

MR. MULTHAUP: Right.

JUSTICE BREYER: -- he didn't say it, that I've made every effort to get from you the place where -- that this -- where the defense counsel says, "Jury, I agree, you cannot put this into Factor (k)."

MR. MULTHAUP: Okay. And, Your Honor, looking at it in context, given the District Attorney's argument, the District Attorney said, "I can't imagine you won't be

told that it doesn't -- that it -- that it doesn't fit within Factor (k)." So, the defense attorney gets up and says, "I'm -- I am going to tell you that it doesn't within -- fit within Factor (k). It doesn't" --

JUSTICE KENNEDY: And that page --

MR. MULTHAUP: -- "constitute" --

JUSTICE KENNEDY: -- where he says that is where?

MR. MULTHAUP: When he -- when he says, Your Honor, "It doesn't constitute an excuse."

JUSTICE BREYER: As long as it doesn't constitute an excuse.

MR. MULTHAUP: It doesn't excuse, in any way, Your Honor. And we -- as a matter --

JUSTICE KENNEDY: But in -- but, in a sense, that's right, just like remorse. Remorse doesn't excuse the crime. It's a consideration that you take into account in assessing the gravity of the crime for purposes of punishment.

MR. MULTHAUP: Your Honor, this is a point of, perhaps, semantics. But the -- by the time you get to the penalty phase, there's nothing to excuse the crime, in the sense of self-defense or "not guilty by reason of insanity." The only thing --

JUSTICE BREYER: -- "in any way."

MR. MULTHAUP: It does say "in any way."

JUSTICE BREYER: Where?

JUSTICE KENNEDY: It's on page 9 of your -- of your brief. The --

MR. MULTHAUP: Thank you.

JUSTICE BREYER: Thank you.

JUSTICE KENNEDY: -- italicized portion.

JUSTICE STEVENS: It's on 166 of the joint appendix.

MR. MULTHAUP: Thank you.

And if the -- if the trial counsel was trying to make the point that, "Well, it doesn't constitute a legal excuse, but it does constitute a partial excuse or some kind of mitigating evidence under this statute," he would have put that in there. The clear import, from the context here, is that defense counsel was not trying to sell the jury a position that was, on its face, untenable, but, rather, to acknowledge that it did not fit within the "excuse the gravity of the crime" factor --

JUSTICE SCALIA: Only if you think that excusing the crime and extenuating its gravity are one and the same thing, which I don't really think.

MR. MULTHAUP: Well, Your Honor, there's two -- I'd like to make two responses to that. First of all, this Court has used those terms interchangeably in Boyde

and Payton, with respect to mitigating evidence. Second of all, let's -- as a -- as a practical matter, we have a defense attorney arguing a case to a jury in a Central Valley California county. And if the defense attorney has a choice between two synonyms, one which is used in common parlance, "excuse," and one which is not used in common parlance, "extenuate," it hardly constitutes an --

And now I'd like to drop the second shoe of the key components of our claim. The first shoe was the arguments of counsel that we have discussed the various permutations on. The most likely -- so the jury began deliberating based on the instructions and the arguments that they had, that they had had.

And it's entirely likely that when the jury was favoring a life verdict during the first part of their deliberations, Belmonte's prospects for good behavior in prison and contributions were part of the debate. When Juror Hern asked for judicial clarification -- not clarification case, confirmation of a very specific view that only the enumerated factors could be considered in the penalty phase deliberations.

The jury in the trial court assented without qualification to that. At that point, the jury would have very likely thought the trial court who holds a position of great deference to us, much more than most other authority figures we have in our life just told us what the marching orders are here. This is the framework for decision.

Now, what happened during trial is the defense, I'm suggesting what the jury might have thought in relation to your question, that the defense attorney was taking his best shot for his client, pushing the envelope, he went over the top a little bit, but defense attorneys do that. The prosecutor was being a very decent stand up kind of person, and -- but right now, when we get down to the business of making a decision, we have to follow the rules. And the rules are what the -- are what Judge Gisson just confirmed to us, that we are limited to the enumerated factors, and Factor (k) does not include the Skipper evidence because that was explained to us by counsel.

I'd like to --

CHIEF JUSTICE ROBERTS: Before you move on.

JUSTICE KENNEDY: Excuse me.

CHIEF JUSTICE ROBERTS: Don't you have to address the Teague question a little bit. You're entitled to this new rule adopted by the Court of Appeals only if it was dictated as precedent at the time the judgment became final. Isn't that kind of a hard argument to make in light of our subsequent decision in Brown vs. Payton.

MR. MULTHAUP: Your Honor, I don't see -- as to the first part of Your Honor's question, I don't believe that there is any rule whatsoever in the Ninth Circuit opinion, it's a straightforward application of Boyde, to the totality of circumstances that occurred.

CHIEF JUSTICE ROBERTS: Boyde, to straightforward application of Boyde?

MR. MULTHAUP: Yes. The Ninth Circuit began with Boyde, and it went through all of the proceedings at trial and concluded that there was a reasonable likelihood that the jury didn't consider Skipper evidence. And that's what we are asking this Court to do, the exact same applying the Boyde test to the rule, the rule decision that was clearly established by this Court as of 1986, and expanded by this Court in 1987 with Skipper.

JUSTICE SCALIA: But what has to be clear under Teague is not just the rule, but the rule's application in circumstances like this. There are a lot of rules that are clear, but if Teague means anything at all it has to mean that you should have known that in this case, the rule would produce this result. So it's not enough to say that there was a rule. There are a lot of rules out there, but the question is whether the outcome should have been clear at the time. Isn't that what Teague means?

MR. MULTHAUP: Certainly, Your Honor. And applying, because when we take a look at Penrey I, this Court said in response to a Teague argument by the Attorney General, this Court held that Penrey got past the threshold Teague issue, because at the time of the finality of his direct appeal in 1986, the rule was well-established that the sentencer may not

be precluded from considering relevant evidence in mitigation by Locke, Eddings, and others. So if that was a firmly established rule as of 1986 --

CHIEF JUSTICE ROBERTS: Well, Penrey was considerably tightened by the subsequent decision in Graham vs. Collins, though.

MR. MULTHAUP: Graham v. Collins was an ADPA case, as was Payton. So we have a very, very different standard of review. And if I may, Your Honor --

CHIEF JUSTICE ROBERTS: I know Payton was an ADPA case, but it nonetheless concluded that it was not unreasonable for the California Supreme Court to read Instruction (k) in a way that allowed this evidence to be considered. And I would have thought, if it was not unreasonable to have that reading, that the contrary reading that you're proposing, and that the Ninth Circuit adopted below, could hardly be said to have been dictated by existing precedent.

MR. MULTHAUP: Well, the -- our position in relation to that is the direct quote from -- direct quote from Payton itself in which the Court said that assuming the California Supreme Court was incorrect, Payton nonetheless loses. Here we are arguing that the California Supreme Court was incorrect, and therefore Belmonte should win.

CHIEF JUSTICE ROBERTS: That's because even if incorrect, it was nonetheless reasonable. And I'm just having trouble

understanding how, if a contrary position is dictated by precedent under Teague, a reading 180 degrees the opposite of that could be regarded by this Court as reasonable.

MR. MULTHAUP: The -- the unusual facts of this case are much stronger in favor of relief under the Boyde test than with those in Payton. Therefore, applying the long-standing rule of Locke and Eddings to the different and more compelling facts of this case, there is no reason -- there is every reason to provide Belmonte relief where it was denied to Payton. And there is no reason to believe that the California Supreme Court was being incorrect but reasonable in -- to presume or find, based on Payton, the California Supreme Court was being incorrect but reasonable in this case.

Penrey could not have won his case under the, under the -- that particular analysis, because the --

CHIEF JUSTICE ROBERTS: Graham didn't win his case.

MR. MULTHAUP: And Payton didn't win either, but we are operating under the prior regime. So I understand, the Court is suggesting, I believe, that somehow Payton is a sword in some sense to deny relief as to all California defendants under penalty phase instructional claims cited by the California Supreme Court, even under different facts and under more egregious circumstances.

I may be misinterpreting the Court's argument, but I would argue that there are any number of scenarios, notwithstanding

Payton, that would require relief under the pre-ADPA standards when you apply the test of Boyde to all the circumstances of the case.

JUSTICE GINSBURG: Mr. Multhaup, one aspect of your argument I wish you would clarify and that's in your brief at page 20 footnote three and as I understand it, you are saying you are not challenging fact, the Factor (k) instruction as excluding Skipper evidence. Your challenge is limited to this particular case. Is that what you're saying in that footnote.

MR. MULTHAUP: Yes, Your Honor. I'm not here to refight the battle of Boyde. I spent tons of hours of time and printer's ink in an amicus brief in 1989 and I understand the concept of new rules. What I argue is that the Boyde test should be applied to the circumstances of this case, and the Factor (k) standing alone in a case where Defendant relies on Skipper evidence does not warrant relief by that fact alone. Here we have much more than that fact which under Boyde does call for, for relief. I would like to give Respondents -- begins begins the much more is the question since the jury asked?

MR. MULTHAUP: The much more includes the arguments by counsel which notwithstanding different, reasonably different views of it does put a context on the, puts a context on what defense counsel was arguing. We have the confusion inherent in the instruction that the Court gave the putatively proper

instruction about being illustrative rather than exhaustive. We have the colloquy during the penalty deliberations. We have Juror Hailstone's follow-up question regarding the possibility of considering the availability of psychiatric treatment, which was explicitly rejected, and very likely confirming the message that had just been given via the answer to Juror Hern's case that only the enumerated factors could be considered.

CHIEF JUSTICE ROBERTS: Well, there is no evidence on that question presented, right, the reason that the possibility of psychiatric evidence could not be considered is because neither party had put evidence of that question before the jury.

MR. MULTHAUP: Well, Your Honor, you know that because you're the Chief Justice, but the people of San Joaquin County had no idea that that was the reason, and it was not explained.

CHIEF JUSTICE ROBERTS: But it's a question of what mitigating evidence was put before the jury. The jurors couldn't consider that because it was quite proper for the trial judge to say you can't consider that because there was no evidence on it.

MR. MULTHAUP: It would have been perfectly proper for the trial court to say you can't consider that because, appended exactly the explanation that you gave, and the jurors would have understood that they had to consider the evidence presented but they couldn't speculate about other things. If at the crucial point in the proceedings the trial court had said Juror Hern,

you do have to pay attention to those factors, but they are illustrative rather than exhaustive, and you must consider all of Belmontes' evidence, please go back and deliberate, that would have cured the errors here. However, the error occurred when the court didn't do that, and Juror Hailstone's question, the trial court's answer could only have reaffirmed the misimpression that the court returned to deliberate with.

And if -- just a few minutes. I'd like to give Respondent's answer to Justice Kennedy's question to Petitioner paraphrasing somewhat, how does Skipper evidence extenuate the gravity of the crime? And the answer is, it doesn't at all logically, ethically or morally. As defense counsel conveyed to the jury, the circumstances of the crime are what they are and there is nothing that can be done about that. The circumstances of the crime are immutable and irreparable. The only thing that can be extenuated in a penalty presentation is Petitioner's culpability for the crime, and counsel argued that Petitioner's culpability was to some extent extenuated and mitigated because the evidence showed that there was no plan to kill the decedent when they went to her house.

JUSTICE KENNEDY: You said remorse extenuates the gravity of the crime for punishment purposes under Factor (k). And that's --

MR. MULTHAUP: Of course --

JUSTICE KENNEDY: And that's post crime.

MR. MULTHAUP: Your Honor, this pre and post distinction I don't believe has, is a relevant distinction. It's whether it's functionally related to the culpability for the crime, because when a Defendant expresses remorse --

JUSTICE KENNEDY: Oh, you think the pre and post distinction has no bearing on this case? I thought that was the linchpin of your argument?

MR. MULTHAUP: No, Your Honor. It's, the Skipper evidence is a specific and different kind of mitigating character evidence that doesn't extenuate the gravity of the crime but it provides a different kind of reason for sparing the defendant's life. There is --

JUSTICE GINSBURG: And yours is both pre and post, that is, you're referring to conduct that took place before this crime was committed, that is his prior incarceration, and asking the jury to project that forward to say that's how he behaved in prison before he committed this most recent crime, and that's how he is likely to behave again.

MR. MULTHAUP: Well, all of the Skipper evidence in this case has occurred as a matter of historical fact before the capital crime and, which in fact gives it much more weight because it can't be suggested that he contrived his good conduct after being arrested for the capital crime. But, I'm going to make a broad statement here. There is no reported case in California where either a defense attorney or the California

Supreme Court makes a text-based argument that Skipper evidence extenuates the gravity of the crime, because it's illogical and doesn't work. Look what the defense attorney did in Payton. He argued that, well, of course you have to consider that evidence under Factor (k) because it's a catch-all. It's supposed to be inclusive. That's not a text-based argument, that's a circumstantial evidence kind of argument. When we look at that, when you look at that phrasing of extenuating the gravity of the crime, there's a plain meaning in English, and the distinction made in Skipper itself that Skipper evidence does not relate to petitioner's culpability for the crime, the jury is going to appreciate what the attorney said to him, that the youth authority religious evidence does not extenuate the gravity of the crime, but has independent mitigating effect outside those enumerated factors. There is nothing, that's a perfectly appropriate position to take, no constitutional problem there, until during deliberations the trial court confirmed that they could only consider the enumerated factors and could not consider nonstatutory mitigation, any other kind of mitigation, because that in effect closed out consideration of the, of the Skipper evidence.

JUSTICE SCALIA: If the judge's response to Juror Hern was so misleading, why didn't counsel object to it, if it was as obviously misleading as you say?

MR. MULTHAUP: Your Honor, it's like stepping off a curb

and seeing a bicycle that you didn't see coming. This occurred during juror deliberations. Nobody expected the juror to ask a question of this type, and of course I'm speculating here, but the trial court fielded the question, responded off the cuff, and the jury went back.

JUSTICE SCALIA: That's why you have counsel there, to help the court when the court makes a real boo-boo, and if this was as obviously error as you say, one would have expected some objection from defense counsel.

MR. MULTHAUF: One could also have expected the trial court to say let's take a minute to think about that, we'll go into recess. I'd like counsel's opinion on this because this is a difficult question, it's not a simple yes or no answer.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Johnson, you have six minutes remaining.

REBUTTAL ARGUMENT OF MARK A. JOHNSON

ON BEHALF OF PETITIONER

MR. JOHNSON: Thank you, Your Honor. Your Honor, I'd like to briefly touch on the Teague issue. At the time Belmontes' judgment was pending, there was no precedent that would have dictated the Ninth Circuit's conclusion regarding the sufficiency of the Factor (k) instruction and indeed, this court's subsequent holdings in Boyde and Payton, they were aware of the fact that it was at least, that that decision certainly was not dictated by precedent. In Boyde, this court dealt with

evidence of good character that was precisely the same as the evidence of good character here, that Belmontes' evidence of having succeeded during a prior commitment and religious conversion, that he might be able to help others in the future, was good character evidence in the same way that Boyde's evidence of having won a dancing prize, or having helped children, of having autistic abilities, was all good character. And there is certainly nothing in Boyde to suggest that there is any distinction, but even if there was, it would not be one that would compel all rational jurors to distinguish the two cases.

And that's further buttressed, of course, by this Court's more recent opinion in Payton, which found that it was at least reasonable for the state court to conclude that Payton's post-crime forward-looking evidence would be understood to fall within the Factor (k) instruction if it was at least reasonable for California to find that such forward, post-crime forward-looking evidence would fit within the Factor (k), the Ninth Circuit's conclusion to the contrary, that this precrime good character evidence certainly was not dictated by precedent.

I'd also like to address quickly with my remaining time Mr. Multhaup's argument regarding the jury, the argument of counsel and the jury questions.

Again, Boyde counsels that the relevant consideration is whether there is any reasonable likelihood that the jurors view the instructions in a way as to foreclose consideration of

constitutionally relevant evidence. In this case, both the jurors weren't instructed, but the Factor (k) evidence said they were given the supplemental instruction that said that the previous listed factors were only examples of some, and then both counsel said that the jurors could and should consider this evidence. Is there some possibility out there that some juror might have misinterpreted this in a different manner? I suppose so, but there is certainly no reasonable likelihood especially in light of the fact that Belmontes' evidence virtually all that was directed at this main thrust of the argument. And just like in Payton and Boyde, for the jurors to have believed that they could not consider that evidence would have turned the whole proceedings in a virtual charade or pointless exercise. Suppose that the questions during jury deliberations, it's most important to recognize none of these jurors said anything to suggest that they were actually confused about whether they could consider any evidence offered. They, their question, Juror Hern's question merely related that she wanted to confirm her understanding about the mitigating versus aggravating factors under California law and certainly the parties there would have been in a better position to realize that if these questions somehow suggested some am big the I there was no objection there moreover in the same conference, the judge advised the jurors to review the instructions again which of course again included the Factor (k) and which of course

included the supplemental instruction that said that their consideration of mitigating factors was not limited to those in the middle but those in the middle were merely examples. If the court has no further questions, I will submit the case.

CHIEF JUSTICE ROBERTS: Thank you counsel, the case is submitted.

[Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.]

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